In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 552

SAMUEL C. HALPERT, a single man, HAROLD A. MILLER and GRACE B. MILLER, his wife, and EUGENE B. McDONOUGH and LILLIAN McDONOUGH, his wife, APPELLANTS

v.

STEWART L. UDALL, individually and as Secretary of the Interior of the United States of America

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(c) of the Revised Rules of this Court, appellee moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment entered July 10, 1964, by a three-judge court convened in the

United States District Court for the Southern District of Florida, Miami Division, pursuant to 28 U.S.C. 2282.

The appellants are the owners of a 200-acre tract of land in Dade County, Florida, which they acquired in 1956. They brought this action against the appellee, the Secretary of the Interior, to quiet title to their lands free of any restriction imposed by the Act of July 2, 1958, 72 Stat. 280, 16 U.S.C. 410i, *et seq.*, which enlarged the exterior boundaries of the Everglades National Park so as to surround their lands, to enjoin the Secretary from taking any action under the Act and to have the Act declared unconstitutional as an encumbrance against their lands.

Briefly, the history is as follows.

In 1929, the Secretary of the Interior was authorized to investigate the desirability of establishing a national park in the Florida Everglades. Act of March 1, 1929, 45 Stat. 1443. In the same year, the State of Florida created the Everglades National Park Commission and authorized it to acquire lands in the Everglades and to transfer title to such lands to the United States for the park. By the act of May 30, 1934, 48 Stat. 816, 16 U.S.C. 410, Congress authorized the establishment of the Everglades National Park when title to all lands recommended by the Secretary of the Interior had been vested in the United States. By amendatory and supplemental legislation pertaining to the Everglades, the State of Florida in 1935 ceded exclusive jurisdiction over all territory deeded or conveyed to the United States. Laws of

Florida, 1935, Ch. 16996. By 1947, title to lands acquired by the State of Florida in the Everglades had been transferred to the United States and the Everglades National Park was established and dedicated. In that year, the State of Florida made the provisions of its 1935 cession applicable not only to lands conveyed by it to the United States but "to all lands acquired for national park purposes within the present and future boundaries of the Everglades National Park by the United States of America through and by purchase, grant, condemnation, donation or any other lawful means." Laws of Florida, 1947, Ch. 23910.

By the Act of July 2, 1958, 72 Stat. 280, 16 U.S.C. 410i, the exterior boundaries of the park were changed and some lands formerly within the park area were excluded. Some lands not previously in the park were included. The statute provided that property within the revised boundary should continue to be administered as the Everglades National Park, but that property not in federal ownership "shall be administered as a part of the park only after being acquired" as provided by the Act. Section 410j authorized the Secretary of the Interior to acquire lands held in private ownership within the park boundaries, provided that no parcel within a described area, which includes the area in which the appellants' land is located, "shall be acquired without the consent of its owner so long as it is used exclusively for agricultural purposes, including housing, directly incident thereto, or is lying fallow or remains in its natural state."

After the three-judge court was convened, the appellants amended their complaint to assert that the appellee had closed a public highway which had been in use for over 30 years and which abutted the appellants' land. They alleged that persons using the road were required to pass a control and identification point established by the appellee and that the road was permitted to remain in a state of disrepair. The appellants requested additional relief, requiring the Secretary of the Interior to remove the barrier, eliminate the checkpoint, and maintain the abandoned highway in a safe condition.

ARGUMENT

THE JUDGMENT OF DISMISSAL SHOULD BE AFFIRMED BECAUSE THE CASE DOES NOT PRESENT A JUSTICIABLE CONTROVERSY AND DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION.

A. NO JUSTICIABLE CONTROVERSY IS PRESENTED.

A suit against an individual, in this case the Secretary of the Interior, to declare an act of Congress unconstitutional and for injunctive relief, does not present a justiciable controversy nor a substantial constitutional question when the act of Congress does not by its terms deprive appellants of any property and when the appellee has not threatened, does not threaten, and has manifested no intention to interfere with appellants' property. The court below expressly found that neither the Secretary of the Interior, the appellee in this action, nor the United States, has taken any steps to exercise dominion over

appellants' property or to interfere in any way with their personal use and enjoyment.

It seems plain, therefore, that the appellants' action for declaratory judgment and for injunction against the appellee Secretary of the Interior does not present a justiciable controversy.

B. NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS PRESENTED.

Mere enactment of legislation authorizing condemnation of private property is not a "taking" of the property. *Willink* v. *United States*, 240 U.S. 572; *Danforth* v. *United States*, 308 U.S. 271, 286; *United States* v. *Miller*, 317 U.S. 369; *Martin* v. *United States*, 270 F. 2d 65 (C.A. 4); *Beistline* v. *City of San Diego*, 256 F. 2d 421 (C.A. 9), certiorari denied, 358 U.S. 865; *23 Tracts of Land, Etc.* v. *United States*, 177 F. 2d 967 (C.A. 6). And it has been decided that the threat to condemn one's property does not constitute a "taking" of the property. *Hempstead Warehouse Corp.* v. *United States*, 98 F. Supp. 572, 120 C. Cls. 291.

The three-judge court found that the closing of the public highway which abutted appellants' property did not deprive the appellants of any property right. The portion of the highway which appellants requested the court to require the Secretary to restore runs through lands within the park owned by the United States and over which the State has ceded jurisdiction. The State has conveyed to the United States all of the land owned by it within the park boundaries. While the State of Florida might possibly contend that it did not convey title or even cede jurisdiction of the

highway to the United States, cf. *Colorado* v. *Toll*, 268 U.S. 228 (1925), it is not a party here and no such contention has been made.

The court further held that there is no constitutional prohibition against enclosing land in private ownership within the outer boundaries of a national park. See, for example, the factual situation in *Robbins v. United States*, 284 Fed. 39 (C.A. 8); *United States* v. *Peterson*, 91 F. Supp. 209 (S.D. Cal.), affirmed, 191 F. 2d 154 (C.A. 9), certiorari denied *sub nom. California* v. *United States*, 342 U.S. 885 and *Curtin* v. *Benson*, 222 U.S. 78. As the court found, the regulations of the National Park Service recognize the rights of owners of private lands within the limits of national parks to the use and enjoyment of such land. See 36 C.F.R. 1.32.

Even if it were to be decided that the statutory authorization for future condemnation of appellants' land under special circumstances constituted a present partial taking of the property, that conclusion (as Judge Choate pointed out in his concurring opinion) would not support the present action for injunctive and declaratory relief. For, in that event, appellants' remedy would be a suit for just compensation under the Tucker Act, 28 U.S.C. 1346. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Dugan* v. *Rank*, 372 U.S. 609.

We conclude that no substantial constitutional question is presented which justifies plenary consideration here. Accordingly, the judgment below should be

affirmed.[1] *California Water Service Co.* v. *Redding*, 304 U.S. 252.

CONCLUSION

For the foregoing reasons, the judgment should be summarily affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

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Attorneys.

OCTOBER 1964.

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[1] It may well be that the constitutional challenge to the Act of July 2, 1958, was so insubstantial as to deprive the statutory court of three judges of jurisdiction (as initially urged by appellee in opposing the application for the three-judge court). In that event, the appropriate disposition here might be to vacate the judgment and remand the case to a single district judge (who, in the absence of other issues, must dismiss the complaint). See *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171. However, in light of the concurrence of the three judges below and the absence of any issue for decision by a single judge, it would seem appropriate to decide no more than that the constitutional question merits no further argument.

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